

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

DIVERSE STEEL, INC. and
PINNACLE STEEL, INC., Alter Egos

and

CASE 26-CA-20799

INTERNATIONAL ASSOCIATION OF
BRIDGE, STRUCTURAL, ORNAMENTAL,
AND REINFORCING IRON WORKERS
LOCAL 321, AFL-CIO

Rosalind Eddins, Esq., for the General Counsel.
James E. Nickels, Esq., for the Charging Party.
Oscar E. Davis, Jr., Esq., for Respondent.

DECISION

Statement of the Case

MARGARET G. BRAKEBUSCH, Administrative Law Judge. The charge was filed by the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers Local 321, AFL-CIO (Union) on July 9, 2002.¹ An amended charge was filed by the Union on October 30, 2002 and the complaint issued on October 31, 2002. An Amendment to Complaint and Notice of Hearing issued on February 7, 2003. The complaint alleges that about May 2002, Pinnacle Steel, Inc., (Pinnacle) was resurrected by Diverse Steel, Inc., (Diverse) as a substitute instrument to and a disguised continuation of Diverse. The complaint alleges that Pinnacle and Diverse, (herein also collectively called Respondent) are, and have been at all material times, alter egos and a single employer within the meaning of the National Labor Relations Act (the Act). The complaint further alleges that Respondent withdrew its recognition of the Union as the exclusive collective bargaining representative of certain employees of Respondent and has since refused to recognize or bargain with the Union. The complaint also alleges that Respondent refused to recall any of the Unit

1 All dates are in 2002 unless otherwise indicated.

employees to work on the Rave 18 theater project in Little Rock, Arkansas because its employees joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

I heard this matter in Little Rock, Arkansas on February 13 and 14, 2003. The General Counsel, Union, and Respondent filed briefs, which I have considered. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs, I find that Respondent engaged in certain conduct in violation of Section 8(a)(5) and (1) of the Act.

Findings of Fact

I. Jurisdiction

Respondent, a corporation is engaged in the building and construction industry performing structural steel erection in central Arkansas at its facility in Roland, Arkansas. Respondent stipulated that during a relevant 12-month period, Diverse and Pinnacle have provided services to general contractors within the state of Arkansas who have met the Board's jurisdictional standards by their purchases and services provided outside the state of Arkansas. Based upon the stipulation and there being no evidence to the contrary, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Issues

The threshold issue in this case is whether Pinnacle and Diverse have been alter egos and/or single employers within the meaning of the Act. Once General Counsel has established the existence of an alter ego or single employer, the issue then becomes the extent to which Pinnacle is liable for Diverse's contractual obligations and Diverse's unfair labor practices under the Act. General Counsel also alleges that Diverse and Pinnacle have violated Section 8(a)(3) and (1) of the Act by refusing to recall any of the Unit employees of Diverse to work on the Rave 18 project performed by Pinnacle. General Counsel submits that Respondent failed to recall these employees because they joined and assisted the Union and because they engaged in concerted activities.

B. Background

In January 1994, Troy Noe formed Central Arkansas ReBar, Inc., herein ReBar, a company specializing in the reinforcement of steel within concrete structures. Troy Noe was the president and sole stockholder and his wife, Gwen Noe, was the corporation's secretary/treasurer. In May 1997, Troy Noe, Gwen Noe, and Gwen Noe's mother; Joan Drilling, incorporated Diverse Steel, Inc. to do structural steel erection, rebar installation, rigging, and machinery moving. Noe testified that he discontinued the work of ReBar, with Diverse Steel Inc., (Diverse) being more of a change in name and the addition of structural steel work. Troy Noe is the sole owner of all Diverse stock. Not only has his name appeared

on Diverse's corporate tax return, but he applied for, and met the state's requirements for Diverse's yearly renewal of its contracting license.

5 Noe has had a relationship with the Union since 1982 or 1983. He became an
 apprentice instructor for the Union in 1990 or 1991 and continued to teach until 2000. The
 record is without dispute that Diverse was a member of the association of steel erector
 employers. The most recent contract between the Union and the Arkansas Best Contractors
 and the Arkansas Commercial and Industrial Builders and Steel Erectors Association covered
 10 the period from May 1, 2001 to May 1, 2003. The agreement provided that the Union will
 refer all employees and wage rates and fringe benefits will be paid consistent with the
 collective bargaining agreement. The agreement was signed by Thomas Marsh for the Union.
 Boyd Sanders; Chairman of the Arkansas Best Contractors, and Troy Noe; Chairman of the
 Arkansas Commercial and Industrial Builders and Steel Erectors Association signed the
 15 agreement on behalf of the employers.

Noe estimated that as an employer, he has been delinquent in paying health and
 welfare contributions since at least 1992 or 1993. On March 15, 2002, the Trustees of the
 20 Iron Workers of Saint Louis District Council Annuity Trust, Trustees of the Iron Workers
 Saint Louis District Council Pension Fund Trust and Trustees of the Iron Workers Saint Louis
 District Council Welfare Plan filed suit against both Rebar, and Diverse for failure to pay the
 requisite and past due benefit contributions.

25 C. The Formation of Pinnacle Steel, Inc.

Gwen Noe testified that while she had initially been a full partner with her husband
 and a corporate officer in Diverse, she ceased to be a corporate officer in December 1997.
 She explained that elections were held for office in 1997 and she asked that she not be
 30 considered for office. Neither Gwen Noe nor Troy Noe identified any other individuals who
 ever served or sought to be Diverse corporate officers other than the three original
 incorporating officers. Gwen Noe acknowledged however, that her she did not document her
 resignation as corporate officer with the State of Arkansas until August 30, 2001. Respondent
 35 submitted into evidence a letter dated August 30, 2001 that was signed by Joan Drilling. The
 letter, addressed to Diverse, confirmed Drilling's resignation as an officer of Diverse and
 acknowledged her understanding that she forfeited all her rights to any profits or stock in
 Diverse.² Gwen Noe testified that she resigned her office with Diverse because her husband
 wanted to bid on jobs that she thought were too big for the company. She added that she also
 40 felt that he was not getting his "money's worth" from his relationship with the Union.
 Despite having resigned her office, she has continued to do Diverse's bookkeeping and to
 maintain its payroll records. She has authority to sign for certification of payment to
 contractors with whom Diverse does business. Noe also admitted that prior to the benefit
 funds' lawsuit in 2002, she spoke with the funds' attorney about working out a payment plan
 45 for Diverse to repay the deficit benefit funds.

Pinnacle Steel, Inc. (Pinnacle), was incorporated in February 1998. Gwen Noe
 testified that she is President of Pinnacle and that she and her father; John Drilling, are the

2 Drilling was not presented to testify in the hearing.

sole owners of Pinnacle. There is no dispute that since its inception, Pinnacle has not recognized the International Association of Bridge, Structural, Ornamental, and Reinforcing Iron Workers Local 321, AFL-CIO or any other union as representative of its employees. Pinnacle's Articles of Incorporation list Gwen Noe, John Drilling, and Joseph Jackson as the company's incorporators. Troy Noe testified that Jackson first came to work for Diverse in 1997 and that Noe took him "under his wing." Gwen Noe described Jackson as a friend who showed an interest in the business but "didn't have anything financially to bring to the company." Pinnacle filed an application form for Certificate of Authority for the state of Louisiana in August 1998 and filed for Louisiana contracting licenses in 2000 and 2001. To date, Pinnacle has never performed any work in the State of Louisiana. Gwen Noe testified that initially Pinnacle did not intend to perform work in Arkansas and it was not until approximately 1999 that Pinnacle obtained a contracting license to work in the state of Arkansas. Pinnacle performed two jobs in 1998 and one two-month job in 1999. In 2000, Pinnacle performed one job that lasted for two days and three additional jobs that were each completed in one day. The company's records reflect that no work was performed during 2001. Gwen Noe testified that the company was not able to take any jobs for a period of a year and a half because Joe Jackson had not wanted to travel. During the interim however, he continued to work for Diverse.

Gwen Noe testified that she takes care of the day-to-day management of Pinnacle. Her father lives in Russellville Arkansas; approximately 75 miles away from the company's headquarters. She testified that Troy Noe has no ownership in Pinnacle and that he only functions in a supervisory/consultative role.

D. Pinnacle Begins Working in the Little Rock Area and Diverse Ceases to Do Work

Prior to 2002, Pinnacle performed all jobs outside Little Rock, Arkansas and outside the Union's jurisdiction. In November 2001, Pinnacle entered into a contract with East-Harding General Contractors to perform work on what was identified as the Cantrell West project in Little Rock, Arkansas and within the Union's jurisdiction. The subcontract from the general contractor was written specifically to the attention of Troy Noe. Noe admitted that after Pinnacle bid for the job, East-Harding's estimator called him and discussed the job. Noe testified that Joe Jackson was scheduled to leave a Diverse job and take over the supervision of the West Cantrell project. Both Gwen Noe and Troy Noe testified that approximately a month before the West Cantrell job was to begin, Jackson left Diverse and informed Pinnacle that he could not do the West Cantrell job. Gwen Noe testified that when she went to Troy Noe and asked him what she should do, he suggested that Pinnacle subcontract the work to Diverse. With Diverse as the subcontractor, Pinnacle completed the project between February and May 2002. This was the last job performed by Diverse and the last time that Diverse utilized the Union to obtain employees.

On April 23, 2002, Diverse submitted a proposal to General Contractor Vratsinas Construction Company (herein VCC) to perform work on the Rave 18 Theatre project in Little Rock. Diverse was awarded the contract and the project began on May 30, 2002. Diverse began unloading the trucks on the jobsite on June 3. Noe testified that after Diverse was awarded the Rave 18 work, he received notice of the premium amount due for worker's compensation coverage, which was more than he was able to pay. He testified that he went to the general contractor and explained that he could not do the job because he did not have the

requisite insurance coverage. Noe told VCC that the only way that he could do the job was if Pinnacle had the contract. Noe recalled that the general contractor assured him that the agreement had been with Noe and that the VCC didn't care whether Diverse or Pinnacle was the subcontractor. Pinnacle submitted a proposal dated June 3. Pinnacle's proposal mirrored³ that which had been earlier submitted by Diverse with two exceptions; Pinnacle's cost exceeded Diverse's by \$69,370 and Pinnacle's proposal did not include a requirement to pay the prevailing wage rate. Pinnacle was awarded the contract and performed the work from June 2, 2002 until November 20, 2002. Troy Noe supervised the work as superintendent for Pinnacle.

E. The Formation of Wildcat Crane and Rigging

In July 2001, Wildcat Crane and Rigging Inc. (herein Wildcat) was incorporated in the State of Arkansas. Gwen Noe testified that the company is solely owned by her and her father, John Drilling. Noe acknowledged that while her husband is not involved with the company, he recommended that she start the company. Wildcat is an equipment rental company that primarily rents equipment to Diverse and Pinnacle. Gwen Noe recalled only two occasions when equipment had been rented to anyone other than Diverse or Pinnacle⁴ and the rentals involved equipment other than the skycap or Crane. The record reflected that the major pieces of equipment used in the steel erection process are the skytrack, crane, and welder. Gwen Noe admitted that only Diverse and Pinnacle have rented the skytrack and crane from Wildcat. The equipment now owned by Wildcat was acquired from Diverse and Troy Noe. Either Gwen Noe or Troy Noe initially purchased the equipment using their own personal credit. While Wildcat did not purchase the equipment from Diverse, Wildcat rents the equipment to Diverse for less than market value. Pinnacle also rents the equipment for less than market value.

Troy Noe testified that Diverse ceased to own this equipment when Wildcat was created.⁵ He testified that he had not wanted the equipment or the vehicles to be in his name for purposes of liability and that Wildcat had been created to shield him from personal liability. He acknowledged however, that in February 2002, a statement confirming ownership and insurance was submitted by Diverse to the Bank of the Ozarks and he admitted that he used the Wildcat equipment in an attempt to secure a loan for Diverse.

The record contains documentation of current liability insurance coverage for five separate vehicles. The insured is shown to be Troy Noe of Wildcat Crane and Rigging. Pinnacle is shown as additionally insured on these policies. The coverage related to four of the vehicles specifies the listed drivers as Troy Noe, Joseph Jackson, and Gwen Noe.

³ The two proposals contained almost identical spacing, formatting, font size, and wording.

⁴ There had been no charge for one of the rentals.

⁵ He acknowledged however, that he routinely changes the oil in the welding machines now owned by Wildcat.

III. Factual and Legal Conclusions

A. Whether Pinnacle and Diverse are Single Employers and/or Alter Egos

General Counsel submits that Pinnacle is a disguised continuation of Diverse and the two entities have held themselves out to the public as a single-integrated business enterprise, such that they are alter egos and a single employer. General Counsel alleges that Diverse and Pinnacle have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered a common labor policy; have shared common premises and facilities; have provided services for and made sales to each other; and have interchanged personnel with each other.

The Board and the courts have applied the alter ego doctrine in those situations where one employer entity will be regarded as a continuation of a predecessor, and the two will be treated interchangeably for purposes of applying labor laws. The most obvious example occurs when the second entity is created by the owners of the first for the purpose of evading labor law responsibilities; but identity of ownership, management, supervision, business purpose, operation, customers, equipment, and work force are also relevant in determining alter ego status. See *Fallon-Williams Inc.*, 336 NLRB No. 54 (2001), *C.E.K. Indus. Mechanical Contractors, Inc. v. NLRB*, 921 F.2d 350, 354 (1st Cir. 1990). While the Board considers whether one entity was created in an attempt to enable another to avoid its obligations under the Act, the Board has consistently held that such a motive is not necessary for finding alter ego status. *Crawford Door Sales Co.*, 226 NLRB 1144 (1976). In looking at the various factors shared by the entities, the Board has noted that no one factor is controlling or determinative. *NLRB v. Welcome-American Fertilizer Co.*, 443 F.2d 19, 21 (9th Cir. 1971). The existence of such status ultimately depends on “all circumstances of the case” and is characterized as an absence of an “arms’ length relationship found among unintegrated companies” *Operating Engineers Local 627 (South Prairie Construction) v. NLRB*, 518 F.2d 1040, 1045-1046 (D.C. Cir. 1975), *affd.* on this issue sub. nom.

The single employer doctrine is found when two ongoing businesses are treated as a single employer based upon the ground that they are owned and operated as a single unit. See *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18 (1st Cir. 1983), *cert. denied* 464 U.S. 892, 104 S. Ct. 237, (1983). While most of the alter ego criteria remain relevant, motive is normally irrelevant. In finding single employer status, the Board has typically looked to whether there is (1) common ownership; (2) common management; (3) functional interrelation of operations; and (4) centralized control of labor relations. See *Broadcast Employees NABET Local 1264 v. Broadcast Service of Mobile*, 380 U.S. 255, 85 S. Ct. 876 (1965). Not all of the criteria need be present to establish a single employer status⁶ and no single criterion is controlling⁷. As with determining an alter ego status, single employer status “ultimately depends upon ‘all circumstances of the case’ and is characterized by the absence of an ‘arms-length relationship found among unintegrated companies.’” See *Mercy Hospital of Buffalo*, 336 NLRB No. 134, slip op. at page 3 (December 18, 2001). See also *Hahn Motors*, 283 NLRB 901 (1987).

⁶ *DenartCoal Co.*, 315 NLRB 850, 851 (1995), *enfd.* 71 F.3d 486 (4th Cir. 1995).

⁷ *Canned Foods Inc.*, 332 NLRB No. 160, slip op. at 1 (2000).

1. Ownership, Management and Supervision

Respondent asserts that Troy Noe is the sole owner of Diverse and that Gwen Noe and her father; John Drilling, are the sole owners of Pinnacle and Wildcat. Gwen Noe testified that she not only makes the decisions concerning Pinnacle's job bids, but she also goes to the general contractors to pick up building plans, types and prepares bids, submits the bids, and signs the contracts on behalf of Pinnacle. She also maintained that she visits the job sites two or three times each day during the work projects. She explained that her father is an ironworker and that she gained experience by watching the construction process. Respondent also submitted evidence to show that Gwen Noe took the structural steel erection examination for the Louisiana Contractors Licensing Board in December 1998. While she had not passed the examination, she scored 55 out of a possible score of 70.

2. Toy Noe and Diverse's Relationship with Pinnacle

Despite Noe's assertion that she operates Pinnacle independently of her husband, the evidence reflects the contrary. Troy Noe testified that his only relationship with Pinnacle has been as a subcontractor and an employee. He testified that as an employee of Pinnacle, he takes direction from John Drilling and as a superintendent; he oversees the work on Pinnacle's job sites. While he asserts that he is paid by salary, he gave no other information as to the amount or the frequency of payment. Troy Noe's own testimony however, demonstrates the significant role that he plays in Pinnacle's management. Troy Noe testified that Joe Jackson first began working for him at Diverse in 1997 after Jackson completed college. In discussing Jackson's involvement in the two companies, Noe was asked and answered the following:

Q: At some point in time, were there discussions between yourself, Mr. Jackson, and your wife as to potential even involvement in him in her company?

A: Yes, once I felt confident of him running a job without me being there or a lot of phone conversations, I was going to let Gwen and John hire him. I was going to –

Respondent's counsel then interrupted his witness and attempted to rehabilitate and redirect his response by inquiring who made the hiring decisions for the respective companies. Noe then testified that he made the decision for Diverse and that his wife and his father-in-law made the decisions for Pinnacle. Despite counsel's redirection, I believe that Noe's initial response was the more candid response and reflective of his true perception of his relationship with Pinnacle.

Respondent asserts that Troy Noe became Pinnacle's Project Manager for the Rave 18 project on June 3, 2002. Noe testified that as superintendent for Pinnacle, he is responsible for production and assuring that quality control standards are met on the particular job. He contended however, that even as the superintendent he was never involved in labor relations decision-making for Pinnacle. He testified that he had no involvement in determining wages or benefits and that foreman Paul Britton did all of the hiring. Gwen Noe however, testified that Troy Noe directly supervised Britton. Although Troy Noe asserts that he has no involvement in Pinnacle's labor relations, he admitted that his wife solicited his opinion with

respect to hiring certain employees. Noe added that because he had been involved in organizing and “salting” jobs for the union, his wife would ask him if he knew an applicant and she would not hire him if he were known to Noe. Noe then quickly added that this had not occurred because “And course, you can’t really discriminate on jobs like that when it comes to salting.”

The subcontract agreement between Pinnacle and East-Harding Inc., for the Cantrell West project in January 2002 was specifically directed to the attention of Troy Noe at Pinnacle’s box office address. The subcontract agreement between Pinnacle and East-Harding, Inc. for the Morrillton Medical Clinic in April 2002 was also directed to the attention of Troy Noe at Pinnacle’s box office address. Gwen Noe acknowledged that prior to Troy Noe’s becoming project manager for Pinnacle on the Rave 18 job in June 2002, he had been active and supervised other Pinnacle projects. Troy Noe supervised Pinnacle’s 1998 Wal-Mart job in Selmer, Tennessee, Pinnacle’s April 2002 Morrillton Medical Clinic job in Morrillton, Arkansas, as well as the February 2002 Cantrell West job that was subcontracted to Diverse. Toy Noe also recalled that he supervised Pinnacle’s job in Rogers, Arkansas in September 1998.

Troy Noe acknowledges that he looks for jobs for Pinnacle and will sometimes take blue prints to his father-in-law for potential jobs. Noe explained that he has a personal relationship with all of the general contractors’ estimators and they usually call him about potential jobs whether the bid is from Diverse or Pinnacle. Gwen Noe confirms that her husband assists her with preparing bids and proposals and that she generally discusses her bid with her husband before she submits the proposal. Gwen Noe recalled that the general contractor contacted her husband about the Alltell Distribution job. He came to her with the information and they bid the job together. The job was performed by Pinnacle in November and December 2002. Gwen Noe admitted that many of the jobs that Pinnacle was able to obtain were, in part, related to her husband’s reputation and business with Diverse. She admitted that the general contractor’s main condition for Pinnacle’s getting the Rave 18 job was the assurance that Troy Noe would run the job. I also note that Pinnacle did not require Diverse to sign any contract for the subcontracting of the Cantrell West project.

Troy Noe testified that the last job performed by Diverse was the Cantrell West project that was subcontracted from Pinnacle and completed by May 23, 2002. Invoices from NES Equipment Services however, reflect that three booms and a scissor lift were rented to Diverse for the Rave 18 project from June 3, 2002 to June 20, 2002. Noe asserted that NES must have simply put Diverse’s name on the invoice by mistake, however he never contacted NES to tell them that they had incorrectly billed Diverse.

3. Gwen Noe’s Continuing Involvement with Diverse

Gwen Noe asserts that she withdrew as an officer of Diverse in 1997 and has had no ownership or management authority since that time. She asserts that while she has continued to do bookkeeping, payroll, and perform other secretarial functions, she has done so without management authority. Gwen Noe however, continues to have authorization to sign checks for Diverse. Minutes from Diverse Directors’ meetings submitted by Respondent reflect that Gwen Noe continued to attend the meetings until at least September 28, 2002. Minutes from the December 22, 2001 Directors’ meeting document Gwen Noe’s meeting with Diverse’s worker’s compensation carrier about its cancellation of coverage for Diverse. The minutes

from the January 26, 2002 meeting include the statement that Diverse is barely making payroll and that the company borrowed money from Troy and Gwen Noe's personal savings account and from their children's accounts to make payroll. Notes from the meeting on May 26, 2002 reflect that Gwen Noe tried to work out a payment plan with Diverse's new worker's compensation carrier. It is also noted that Gwen Noe had been unsuccessful in obtaining a loan or line of credit from a specific bank. Gwen Noe also acknowledged that prior to the Union's trust funds filing suit against Diverse in March 2002, she had spoken with the funds' attorney about a plan for Diverse to pay a thousand dollars each month toward back due benefits. Troy Noe also acknowledged that notes from Diverse's Directors' meeting of June 30, 2001 document Gwen Noe having contacted OSHA to work out a fine reduction for Diverse.

3. Equipment

The equipment used by Pinnacle is the same equipment that was used by Diverse and initially purchased or acquired by Troy Noe and Gwen Noe using their personal credit. Gwen Noe acknowledged that Troy Noe purchased the skytrack now used by Pinnacle in 1997 or 1998 and he purchased the crane now used by Pinnacle in 2000. Her father originally gave the welding machines that are now used by Pinnacle to Troy Noe. There is no evidence that Pinnacle ever owned any steel erection equipment of its own and apparently used Diverse's until July 2001. The record is without dispute that after the incorporation of Wildcat in July 2001, the ownership of Diverse's equipment was transferred to Wildcat without compensation. Wildcat has subsequently leased the equipment to Diverse and Pinnacle for less than market value. Although Gwen Noe testified that Wildcat could rent the skytrack, crane and welding machines to companies other than Pinnacle or Diverse, she could recall only two incidences when this has occurred. In one of the two examples, no rent was actually charged for the use of a stud box. She explained, "I did not charge them rent on that, as they had done a favor for us." She did not explain nor was she asked whom she meant by "us."

During testimony, as Gwen Noe was describing Wildcat's equipment, she was asked and answered as follows:

Q: Okay, Where did you acquire the equipment?

A: The skytrack was purchased by Troy, I believe, in '97 or early '98. The crane was also purchased by Troy sometime in 2000. One of the welding machines was given to me or given to the company by my father, And - -

Q: When you say the company, which company are you - -

A: Wildcat.

Q: Wildcat

A: Well, they were originally given to Troy when he first started Central Arkansas Rebar.

As indicated by her response, Gwen Noe appears to acknowledge a continuity of ownership beginning with Rebar and continuing to Wildcat; a company that is alleged to be separate and apart from Troy Noe and Diverse.

Gwen Noe testified that while Diverse carried the insurance on the equipment prior to 2001, Pinnacle has covered the insurance premiums since Wildcat’s formation.

4. Continuity of Work Force

The record reflects that Joe Jackson began working for Diverse in 1997 and continued to work for Diverse until 2002. After Pinnacle was formed in 1998, Jackson additionally began working for Pinnacle and at some point was designated as Pinnacle’s Vice President. Gwen Noe confirmed that there was a period between November 2000 and February 2002 when Pinnacle was not able to do any jobs because Jackson did not want to travel out of town. During that time however, he continued to work for Diverse. Gwen Noe also acknowledged that employees Robert Glastetter and Paul Britton worked for both Pinnacle and Diverse.

5. Business Purpose, Operations, Customers

There is no dispute that there is no difference in the scope of work performed by Pinnacle and Diverse. Both companies have a common business purpose of erecting commercial steel structures. Admittedly, Pinnacle’s clients were primarily clients of Diverse and both companies have used the same vendors. Union Business Manager Thomas Marsh testified that several years ago Noe offered to allow Marsh to rent equipment using his account with a vendor. When Marsh received the bill, Pinnacle was shown to be the customer. At that time Marsh was unaware of Pinnacle’s existence. When he questioned Troy Noe about Pinnacle, Noe denied any knowledge of the identity of Pinnacle. Noe testified that he had denied the existence of Pinnacle to Marsh because he didn’t think that it was any of Marsh’s business.

6. Overall Similarity and Interrelatedness

The overall record reflects a significant overlap and interrelatedness in ownership, management, and supervision for both companies. Throughout the relevant period, Troy Noe has supervised and managed projects for both Diverse and Pinnacle. He has actively assisted his wife in bidding and seeking work for Pinnacle. While he contends that he is not involved in the labor relations decision making of Pinnacle, he also admitted that only when he was confident that Jackson was capable of running a job did he “let Gwen and John hired him.” Contrastly, Gwen Noe continued to play an active role for Diverse by negotiating with insurance carriers, lending institutions, and the Union’s trust funds for repayment of Diverse’s back due benefits. She has continued to have authority to write and sign checks on behalf of Diverse and is responsible for completing substantial portions of Diverse’s bookkeeping and payroll records. The record reflects that both Joe Jackson and Paul Britton served in supervisory capacities for both companies. Respondent contends that Troy Noe has sole ownership of Diverse and that Gwen Noe has joint ownership of Pinnacle with her father. January 2002 minutes from the Diverse’s Directors Meeting however, reflect that Diverse borrowed money from Troy and Gwen Noe’s personal saving account as well as from the saving account of their children to make Diverse’s payroll. While Gwen Noe may assert that she has no ownership interest in Diverse, her actions belie such denial. For Gwen Noe to subsidize her husband’s company from her personal savings and her children’s’ savings is more indicative of ownership than mere employee status. I also note that the Board has found that where other alter ego factors exist, ownership of two companies by members of the same

immediate family is deemed to be “substantially identical” ownership. *Kenmore Contracting Co.*, 289 NLRB 336, 337 (1988) enfd. 888 F.2d 125 (2d Cir., 1989). See also *J.M. Tanaka Construction Inc.*, 249 NLRB 238, 242 fn. 29 (1980) enfd. 675 F.2d 1029 (9th Cir. 1982).

5 Despite Respondent’s establishment of Wildcat to buffer liability, both Diverse and Pinnacle have used the same equipment. Although Respondent asserts that Wildcat now owns the equipment, no compensation was given to Diverse for the change in ownership. See *Valley Electric, Inc.*, 336 NLRB No. 133 (2001) where the Board took specific note of the
10 fact that no money ever changed hands in any of the transactions including the sale or transfer of assets such as vehicles, real property or company stock. Diverse has continued to claim ownership as evidenced by its 2002 documentation for a loan application. Although Respondent asserts that Diverse and Pinnacle leased the equipment from Wildcat, such leasing was based upon less than the market value. The facts of the present case are contrary
15 to those of *Friederich Truck Service, Inc.*, 259 NLRB 1294, 1300 (1982) where the Board did not apply the alter ego doctrine. Among the factors relied upon by the Board in *Friederich* in finding an arms’ length relationship was the fact that market value was used for equipment rental.

20 The record reflects that vendors and customers have continued to treat the companies as the same entity. Gwen Noe admitted that many of the jobs that Pinnacle was able to obtain were based in part upon her husband’s reputation and business with Diverse. Bid responses to Pinnacle have been directed to the attention of Troy Noe and Pinnacle’s name was substituted
25 for Diverse or Troy Noe for equipment rental . When Diverse could not perform the work on the Rave 18 project because of inadequacy of insurance coverage, the general contractor insisted on Troy Noe’s presence on the project and it didn’t matter whether the company was Diverse or Pinnacle.

30 The only major difference in the two companies appears to be the fact that while Pinnacle has employed some of the same employees as Diverse, Pinnacle has not utilized the Union for Ironworker referral and has not paid Union wages and benefits. The Board has recognized that the fact that two companies use a different complement of employees does not militate against a finding of alter ego status. Based upon the Board’s rationale in *Angelus Block Co., Inc.*, 250 NLRB 868 (1980), it appears that such factors are the products of a
35 status designed and implemented by Respondent and results from the failure of the Respondent to apply the Union contract to Pinnacle’s employees. Additionally, I note Troy Noe’s admission that because of “salting” concerns, Gwen Noe consulted with him on potential hires and did not want to hire employees that were known to him because of his
40 Union affiliation.

45 The overall record evidence establishes that Diverse and Pinnacle have substantially identical ownership, business purpose, operation, supervision and management. In so finding, I note that both entities are family-owned commercial steel erection companies with Troy Noe functioning in a major role in the overall operation and management of both companies. Both companies use identical equipment and receive the same favorable treatment from a third family-owned company. Both companies perform work for the same customers, based in large part upon Troy Noe’s reputation and past business relationships. Both companies use the same vendors who treat them as a single enterprise. The companies have functioned interchangeably. Pinnacle subcontracted to Diverse to perform the Cantrell West project

without requiring a written subcontracting agreement. In the alternative, Pinnacle performed the work that Diverse began but could not complete on the Rave 18 project. Respondent argues that Gwen Noe and her father are Pinnacle’s sole owners and they make policy decisions while also providing day-to-day personal oversight on Pinnacle’s jobs. The evidence however, reflects that Gwen Noe’s father lives 75 miles away from Little Rock and it is Troy Noe to whom Gwen Noe turns for assistance with day-to-day decision-making. Admittedly, she consults with Troy Noe as to what applicants have union backgrounds, what general contractors to trust, as well as to seek his assistance with preparing bids.

Respondent cites a number of cases where the Board rejected a finding of single-employer status, relying upon the absence of common control of labor relations. Respondent argues that the circumstances are the same in the instant case. While Troy Noe testified that he has no involvement in the labor relations matters of Pinnacle, the evidence does not support this assertion. Noe specifically admitted that Gwen Noe consults with him about the union background of Pinnacle applicants before they are hired. Troy Noe also admitted that Gwen Noe and her father hired Joe Jackson only after he determined that Jackson had the ability to handle the job in issue. Accordingly, the evidence reflects that Troy Noe is significantly involved in Pinnacle’s labor relations matters.

Respondent argues that the record does not establish that Diverse had any desire to run away from obligations under its collective bargaining agreement with the Union by utilizing Pinnacle. Respondent further asserts that absolutely no animus has been established by a preponderance of evidence. Gwen Noe admitted that one of the reasons that she wanted to resign her office with Diverse was her feeling that her husband did not get his “money’s worth” from his Union affiliation. Union secretary Doris Mae Eoff testified that during a conversation with Gwen Noe in April 2002, Gwen remarked that their accountant had told Diverse that they would be better off if they went non-union. Noe candidly testified: “there was no telling what may have come of my mouth.” She went on to explain that if she had said it, it was her opinion and what she felt at the time. As chairman of the Arkansas Best Contractors’ Association, Boyd Sanders attended meetings with Troy Noe and the other contractors in advance of their negotiations with the Union. Sanders recalled that he had heard Troy Noe state in one of the pre-negotiation strategy meetings “Well, this is all I can do and if I can’t get a contract for this, I’ll just have to open shop.” Sanders added that while he recalled only one time that Noe made such a statement, one of the other contractors in the association made that statement in almost every meeting.

Based upon the alleged statements by Gwen and Troy Noe it is apparent that they considered the benefits of Diverse being non-union. I don’t find however, that these statements alone support a finding that Pinnacle was specifically created with the intention to avoid Diverse’s bargaining obligation. The Board has however, found two business entities to be alter egos and held the alter ego employer liable for the predecessor’s contractual obligations and unfair labor practices, even when evidence of antiunion animus or an intent to evade contractual obligations was neither apparent nor shown to have been a factor in the creation of the alter ego. See *Johnstown Corp.*, 313 NLRB 170, 171 (1993), *affd.* in pertinent part sub nom., *A & P Brush Mfg. Corp.*, 323 NLRB 303, 309 (1997). Accordingly, while animus is a factor that has been considered, its absence does not preclude a finding of alter ego status.

The Board has found that the collective bargaining agreement of one entity does not

attach and bind the single employer because there is a single employer finding. See *Samuel Kossoff & Sons, Inc.*, 269 NLRB 424, 429 (1984). The Board has also determined that the criteria for finding a single employer are not the same as those used in determining the scope of the unit. See *Acoustics, Inc.*, 270 NLRB 1046 (1984). Respondent argues that in the instant case, the question of whether employees of Diverse and Pinnacle constitute an appropriate bargaining unit was not legally or factually addressed by either the General Counsel or the Union in either the pleadings or the ensuing hearing. Respondent thus argues that for this reason alone no violation based upon single-employer status is appropriate since the burden of proof and persuasion rests with the General Counsel and/or the Union to establish all necessary criteria. Because I find Pinnacle to be the alter ego of Diverse, it is not necessary that I resolve the single employer or the appropriate unit issue.

Respondent further argues that Diverse had no alternative but to cease operations when it did because it could not legally continue to operate under Arkansas law without workers' compensation insurance for its employees. Respondent acknowledges however, that the presence of a legitimate reason for change in ownership has not precluded the Board from finding an alter ego. Respondent argues that the circumstances of the present case are distinguishable from *Metalsmith Recycling Co.*, 329 NLRB 124, (1999), where the Board found alter ego status even though the respondent argued that there was a legitimate reason for its establishment of the successor company. Respondent points out that in *Metalsmith* there was evidence of independent 8(a)(1) and the Board found that the successor employer was not compelled to resume operation by government ordinances. While Respondent correctly points out these distinctions in *Metalsmith* and the current case, the Board has nevertheless continued to find that the mere presence of a legitimate business reason for a change in corporate status does not preclude finding alter ego. See *Walton Mirror Works, Inc.*, 313 NLRB 1279 (1994) where the predecessor company was found to be closed by a government taxing authority and more recently *Michael's Painting, Inc.*, 337 NLRB No. 140 (2002), where one of the reasons for operating the successor company was to operate without the substantially higher insurance premiums that would have been charged to the predecessor. In summary, once an employer is found to be an alter ego of another, the labor obligations of the original employer are deemed to be shared by, and become that of, its alter ego regardless of the predecessor's motivation for creating the alter ego, and both will be held liable, as a single employer, for any violations of the Act. *Branch International Services*, 327 NLRB No. 50 slip op. at 11 (1998). Accordingly, Respondent's claim that Pinnacle should not be compelled to assume Diverse's bargaining or contractual obligations with the Union or held liable for any unfair labor practices committed by Diverse, because Pinnacle was purportedly created for a legitimate business reason or because Diverse had a legitimate business reason for not performing the work is rejected. *Volk and Huxley*, 280 NLRB 219, 226 (1986).

Based upon the record evidence discussed above, I do not find that Diverse and Pinnacle have functioned independently nor dealt with each other in an arms' length relationship. Finding that both companies have substantially identical ownership, business purpose, operation, customers, equipment, supervision and management, I find Pinnacle to be the alter ego of Diverse. In making this finding, I note that the record is without evidence of any independent 8(a)(1) violations or specific evidence that Pinnacle was formed in 1998 for the sole purpose of evading Respondent's contractual and bargaining obligations. Diverse, in fact, entered into a subsequent collective bargaining agreement with the Union in 2001 after the formation of Pinnacle. Troy Noe testified at length about his history with the Union and

his experiences in training apprentices. He also talked about his own disillusionment with the Union and his opinion that there was no longer the union brotherhood of years past nor were there union craftsmen as before. As Gwen Noe testified, she did not believe that Diverse had gotten its “money’s worth” from its affiliation with the Union. Initially, Pinnacle did little work in comparison to Diverse and even had a period of a year and a half when it attempted no work at all. While Gwen Noe may not have created Pinnacle specifically for the purpose of evading the Union, it is apparent that Pinnacle ultimately became the means by which Diverse could do continue to do business without the limitations and expenses of the Union contract. The record reflects that since about May 2002, Pinnacle has functioned as a disguised continuance of Diverse and an alter ego to Diverse.

B. Pinnacle’s Contractual Obligations as an Alter Ego

In the complaint, General Counsel alleges that about May 20, 2002, Respondent withdrew its recognition of the Union as the exclusive collective bargaining representative of the Unit and on or about May 20 refused to recall any of the Unit employees of Diverse to work on the Rave 18 project. The evidence reflects no written or verbal withdrawal of recognition by Diverse. The evidence reflects that Respondent simply ceased to perform work as Diverse but continued as Pinnacle. Functioning as Pinnacle, Respondent did not apply the terms of the existing collective bargaining agreement, including the requirement that the Union be used as a source of referral for ironworkers and the payment of contract wages and benefit contributions. When two facially different companies are found to be an alter ego of each other, the collective bargaining agreement of one actively binds the other. See *E.G. Sprinkler Corp.*, 268 NLRB 1241 fn. 1, 1244 (1984). Thus, two nominally separate businesses may be regarded as a single enterprise if one is the alter ego or “disguised continuance” of the other. If alter ego status is found to exist, the labor obligations of the original employer is deemed to be shared by its alter ego and both will be held liable as a single employer for any violations of the Act. See *Redway Carriers, Inc.*, 301 NLRB 1113, 1115 (1991). Thus, as the record establishes that Pinnacle failed to apply the terms of the Union contract to its ironworker employees, I find that Diverse and Pinnacle have violated Section 8(a)(5) and (1) of the Act by their failure to do so.

C. Section 8(a)(3) Allegation

Finally, the complaint alleges that Respondent violated Section 8(a)(3) and (1) by refusing to recall any of the Unit employees of Diverse to work on the Rave 18 theater project in Little Rock, Arkansas because the employees joined and assisted the Union and engaged in concerted activities and that Respondent did so to discourage employees from engaging in these activities. A finding that an employer’s decision or action discriminated against employees in violation of Section 8(a)(3) generally requires a showing that antiunion animus was a motivating factor in that decision. In the instant case there is no alleged independent 8(a)(1) nor any evidence of specific antiunion animus. Neither Troy Noe’s discussions with other employers preceding bargaining in 2001 nor Gwen Noe’s statement to the Union’s office secretary rise to the level of animus sufficient to support a finding of an 8 (a)(3) violation.

Additionally, no evidence was presented of specific Unit employees who would have been recalled to the Rave 18 project or evidence of specific employees who attempted to

apply and were rejected because of their Union affiliation. While I find that Pinnacle violated Section 8(a)(5) and (1) of the Act by its failure to abide by Diverse’s contractual obligations, I do not find that Pinnacle violated Section 8(a)(3) of the Act. Under the test set forth in *Wright Line*,⁸ the General Counsel must initially establish a *prima facie* case that Pinnacle’s decision not to recall specific employees to the Rave 18 project was motivated, at least in part, by the employees’ protected activity. I do not find sufficient evidence to support such a finding in this case.

Conclusions of Law

1. Respondent Diverse Steel Inc., is now and at all times material herein, has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent Pinnacle Steel, Inc. is the alter ego of Diverse Steel, Inc.

3. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers Local 321, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

4. All ironworkers as referenced in the collective bargaining agreement⁹ between the Union and the Arkansas Best Contractors and the Arkansas Commercial and Industrial Builders and Steel Erectors Association including those employed by Diverse Steel, Inc. and Pinnacle Steel, Inc. constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.¹⁰

5. At all times material here, the Union has been the exclusive collective bargaining representative of all employees in the Unit found appropriate in Conclusion of Law 4 for the purpose of collective bargaining within the meaning of 9(a) of the Act.

6. By failing and refusing to apply the terms and conditions of the collective bargaining agreement entered into by the Union and Diverse Steel, Inc., to all employees employed in the bargaining unit found appropriate in Conclusion of Law 4, both Respondent Diverse and Pinnacle violated Section 8(a)(5) of the Act.

7. The unfair labor practices set forth in Conclusions of Law 6 violated Section 8(a)(5) and (1) of the Act and affect commerce within the meaning of Section 2(6) and (7) of the Act.

8. Respondent did not violate 8(a)(3) of the Act as alleged in the complaint.

⁸ 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied 495 U.S. 989 (1982).

⁹ While the collective bargaining agreement sets out the geographical jurisdiction applicable to the agreement and numerous other provisions with specificity, the agreement does not define the specific inclusions and exclusions of the appropriate unit.

¹⁰ Respondent admits that Diverse recognized the Union as the collective bargaining representative for the unit employees covered by the May 1, 2001 collective bargaining agreement.

Remedy

Having found that the Respondent has engaged in certain unfair labor practice conduct in violation of Section 8(a)(5) and (1) of the Act, I shall recommend that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹¹

ORDER

The Respondents, Diverse Steel, Inc. and Pinnacle Steel, Inc., located in Roland, Arkansas and Little Rock, Arkansas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collective with the Union, in an appropriate unit, by refusing to apply the terms of its collective bargaining agreement, including wage rates and fringe benefit fund contributions to employees of Diverse Steel, Inc. and Pinnacle Steel, Inc.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Honor and abide by the terms and conditions of its executed collective bargaining agreement with the Union since May 2002, and make whole its employees represented by the Union for any loss of pay and other benefits suffered as a result of Respondent's refusal to apply the collective bargaining agreement to all unit employees. Backpay shall be computed as set forth in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(b) Pay all contractually required fringe benefit fund contributions not previously paid, in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 (1979). In addition, make all unit employees whole for any expenses resulting from the failure to make such contributions, with interest, as set forth in *Kraft Plumbing and Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest, as provided in *New Horizons for the Retarded*, *supra*.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social payment records, including an electron

¹¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

copy of such records if stored in electronic form, necessary to analyze the amount of backpay and benefit contributions due under terms of this Order.

(d) Post at their place of business and at each of their jobsites copies of the attached notice marked “Appendix.”¹² Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 2002.

(e) Sign and return to the Regional Director sufficient copies of the notice for posting by the Union, if it is willing, at its office and meeting halls, including all places where notices to members are customarily posted.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certificate of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C.

Margaret G. Brakebusch
Administrative Law Judge

¹² If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading “POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD” shall read “POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.”

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT fail or refuse to recognize and bargain collectively with the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers Local 32, AFL-CIO, in an appropriate unit of Ironworkers, by refusing to apply the terms and conditions of the collective bargaining agreement, including wage rates and fringe benefits fund contributions to the employees and by abrogating the agreement.

WE WILL honor and abide by the terms and conditions of our contract with the Union since May 2002 and make whole our employees and those individuals who would have been referred through the Union's hiring hall for any loss of pay and other benefits suffered as a result of our refusal to apply the contract to Unit employees and to Unit work, plus interest.

WE WILL pay all contractually required fringe benefit fund contributions not previously paid and make whole Unit employees and those individuals who would have been referred through the Union's hiring hall for any expenses resulting from our failure to make such contributions, plus interest.

**DIVERSE STEEL, INC. and
PINNACLE STEEL, INC., Alter Egos**

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine

whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

1407 Union Avenue, Mid-Memphis Tower Building, Suite 800, Memphis, TN 38104-3627
(901) 544-0018, Hours: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (901) 544-0011.